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A Winner is Who? Fair Use and the Online Distribution of Manga and Video Game Fan Translations

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A Winner is Who? Fair Use and the Online Distribution of Manga and Video Game Fan Translations

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"All your base are belong to us."¹ "A winner is you."² Both of these quotes are found in official and licensed American releases of video games, and both are infamous examples of significantly flawed Japanese to English translations. For an American audience, however, incomprehensible sentences in English may be preferable to the original Japanese text. Americans who want greater access to Japanese products that have not been released in America can find and distribute the material relatively easily, particularly over the Internet. Nonetheless, the language gap is a persistent problem. Frustrated with these poorly-translated English language releases, fans have resorted to translating the sources themselves and distributing the new English language versions online to allow an American audience access to these materials.

Manga and video games, already dominant forms of entertainment in Japan, are becoming firmly established in American culture, resulting in increased legitimacy for these types of entertainment.³ Video games are no longer limited to a teenage-and-under audience, and manga may soon follow. For adults with discriminating tastes, it may not be enough to see just any horror movie when one is aware of a critically acclaimed, smash-hit horror movie from another country and in another language.⁴ Such is the case for many American manga readers and video game players. The massive success and prevalence of manga and video games in Japan necessarily creates market that can not be matched in the United States, but the demand for access to titles released only in Japan will increase as these media continue to become ingrained in mainstream America. Despite all of the technological advances in making those materials accessible to an international audience, a language gap remains between the United States and Japan. Fan translations attempt to bridge that gap.

This note examines the legality of fan translations of Japanese comic books, known as manga, and video games distributed over the Internet, with special consideration given to the application of the fair

1. *Zero Wing* (Toaplan 1991).

2. *Pro Wrestling* (Nintendo 1987).

3. See discussion *infra* Part II.B.2.

4. For example, interest in Japanese horror films (also known as J-horror) has suddenly increased over the last few years. See Stefan Lovgren, *Horror, Japanese Style: Beyond "The Grudge,"* NAT'L GEOGRAPHIC NEWS, Oct. 29, 2004, available at http://news.nationalgeographic.com/news/2004/10/1029_041029_thegrudge.html. Japanese directors pioneered advances in the horror genre to the delight of critics and Japanese audiences, and American audiences quickly followed, first through fan-translated, subtitled films such as *Ringu* and *Ju-On*, and later through official subtitled releases in the United States and English language remakes of *The Ring* and *The Grudge*. See *id.*

use doctrine. Technology related to the distribution of media online grows exponentially compared to the law governing this technology. Although much recent litigation has limited the online distribution of traditional media,⁵ both copyright holders and courts have largely ignored a fringe segment of this distribution. This fringe includes manga and video games. Manga can be easily shared online by scanning images, and video games are now frequently converted into ROM images that can be played on a computer and freely distributed. Much of the original source material comes from Japan and is in Japanese. Therefore, in order to present these media to an American audience, the material must be translated into English. Because the source material was never officially translated, or was so poorly translated as to alter the original, fans translate the material themselves prior to distribution. So far, most copyright holders have not pursued legal action beyond “cease and desist” letters. Changes in the marketability of these materials suggest, however, that the copyright holders may soon stop tolerating this practice.

Although at first glance the issue of fan translations in such niche markets may not seem legally significant, this note argues that this issue has greater implications for application of the fair use doctrine to a variety of media. Furthermore, litigation is the likely outcome as the marketability of manga and video games increases. Copyright protection is fundamentally important in promoting a creative society, but there are occasions when this protection stifles the very creativity it seeks to defend. This note argues that fan-translated video games are such cases, and that courts should modify the test for transformative use in order to promote the intended purposes of copyright law.

Part I of this note provides background on the fair use doctrine and the limited case law applying the fair use factors to online and translated materials. Part II further explores the purpose and process behind fan translations of manga and video games. Part III analyzes the deficiency of the current transformative use test in its application to untraditional forms of media. This Part applies each of the four fair use factors to manga and video games and questions whether the current test produces a fair and logical result. Part III ultimately concludes that under the current test, manga are rightfully not protected by fair use but that the unique characteristics of video game translations deserve protection in accord with the rationales for the Copyright Act. Finally, this note proposes possible solutions to afford this protection to video game fan translations.

5. See discussion *infra* Part I.B.

I. PRELIMINARY CONSIDERATIONS: LAW GOVERNING ONLINE MATERIALS AND TRADITIONAL TRANSLATIONS

A. Copyright Law and the Fair Use Doctrine

Copyright protection in the United States dates back to the Constitution.⁶ The “Framers intended copyright itself to be the engine of free expression.”⁷ In enacting copyright legislation, Congress had three goals: “the promotion of learning, the protection of the public domain, and the granting of an exclusive right to the author.”⁸ Copyright legislation over the last 210 years has attempted to balance the innate tension between individual creation and public consumption by granting benefits to the individual author in order to benefit the general public.⁹ In interpreting these statutes, courts likewise attempt to balance the protection of creative activity with the dissemination of information to promote learning, culture and development. Courts have limited authors’ copyright protections by “allow[ing] the public access to the products of their genius after a limited period of exclusive control has expired.”¹⁰

Section 106 of the Copyright Act lists six exclusive rights for the copyright holder.¹¹ These include the exclusive rights “to prepare derivative works based upon the copyrighted work”¹² and “in the case of literary, musical, dramatic, . . . pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly.”¹³ The Act defines a derivative work as one “based upon one or more preexisting works, such as a translation.”¹⁴ There are limitations on these exclusive rights, however. Courts historically have recognized that certain acts of copying are defensible as fair use.¹⁵ The fair use

6. See U.S. CONST. art. I, § 8, cl. 8 (conferring upon Congress the power to create copyrights “To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries”).

7. *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985).

8. *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1261 (11th Cir. 2001).

9. See *Harper & Row*, 471 U.S. at 546.

10. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984).

11. Copyright Act of 1976, 17 U.S.C. § 106 (2000).

12. *Id.* § 106(2).

13. *Id.* § 106(5).

14. *Id.* § 101.

15. See, e.g., *Folsom v. Marsh*, 9 F. Cas. 342 (Cir. Ct. D. Mass. 1841) (evaluating whether the copying of George Washington’s letter qualified as “justifiable use”).

doctrine permits use of copyrighted material without consent "in a reasonable manner for certain purposes."¹⁶ Section 107 of the Copyright Act describes fair use as the use of material "for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research."¹⁷ In order to determine whether the use of the copyrighted material qualifies as fair use, courts must consider four factors:

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

(2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work.¹⁸

The Supreme Court applied these factors somewhat inconsistently for nearly two decades. In *Sony Corp. of America v. Universal City Studios, Inc.*, the Court stated that "every commercial use of copyrighted material is presumptively . . . unfair."¹⁹ One year later, in *Harper & Row, Publishers, Inc. v. Nation Enterprises*, the Court held that commercial use is merely "a separate factor that tends to weigh against a finding of fair use."²⁰ The Court determined that the fourth factor, effect on the marketability or value of the original, was "the single most important element of fair use,"²¹ but reevaluated this conclusion nine years later.²²

In 1994, the Court finally clarified the fair use doctrine in *Campbell v. Acuff-Rose Music, Inc.*²³ It first noted that the explicit use of terms like "including" and "such as" in the preamble to the Copyright Act indicates that the examples listed by the Act are "illustrative and not limitative," and are meant to "provide only general guidance about the sorts of copying that courts and Congress most commonly had found to be fair uses."²⁴ With regard to fair use,

16. *Rogers v. Koons*, 960 F.2d 301, 308 (2d Cir. 1992).

17. 17 U.S.C. § 107.

18. *Id.*

19. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984).

20. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 562 (1985).

21. *Id.* at 566.

22. *See Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590 n.21 (1994) (noting that the importance of the fourth factor "will vary, not only with the amount of harm, but also with the relative strength of the showing on the other factors").

23. *See generally id.*

24. *Id.* at 577-78 (citing 17 U.S.C. § 101 (2000)).

the Court explained that "Congress meant § 107 to 'restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way' and intended that courts continue the common-law tradition of fair use adjudication."²⁵ The purpose of the fair use doctrine is to allow "courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster."²⁶ The Court stressed that the fair use determination should be made on a case-by-case basis and "is not to be simplified with bright-line rules."²⁷ The Court held that it is impermissible to treat the four factors of § 107 in isolation from each other, and instead required that "[a]ll are to be explored, and the results weighed together, in light of the purposes of copyright."²⁸

For the first factor, the Court explained that the proper inquiry is whether the copied work "merely 'supersede[s] the objects' of the original . . . or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is 'transformative.'"²⁹ The Court further noted in *Campbell* that although transformative use is not absolutely essential to find fair use, "the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works" because transformative works "lie at the heart of the fair use doctrine's guarantee of breathing space within the confines of copyright."³⁰ Furthermore, the Court stated that "the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use."³¹ This new transformative use test was firmly established as the governing rule in *Leibovitz v. Paramount Pictures Corp.*³²

25. *Id.* at 577 (quoting H. R. Rep. No. 94-1476, at 66 (1976); S. Rep. No. 94-473, at 62 (1975)).

26. *Id.* (quoting *Stewart v. Abend*, 495 U.S. 207, 236 (1990)).

27. *Id.*

28. *Id.* at 578.

29. *Id.* at 579 (quoting *Folsom v. Marsh*, 9 F. Cas. 342, 348 (Cir. Ct. D. Mass. 1841)).

30. *Id.* (referencing *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 478-80 (1984) (Blackmun, J., dissenting)).

31. *Id.*

32. 137 F.3d 109, 112 (2d Cir. 1998).

B. Fair Use Online

The Copyright Act also applies to materials originally published in Japan under § 104, National Origin.³³ The Copyright Act does not explicitly entitle video games to copyright protection, but the Court of Appeals for the Seventh Circuit has held that video games are protected audiovisual works.³⁴ In the 1990s, the Internet became a forum for downloading and exchanging copies of console games.³⁵ Programmers developed emulator programs that could run copies of console games on personal computers.³⁶ By converting data from the computer chips and cartridges of actual console games into ROM files, these games could easily be distributed over the Internet and played on the computer with an emulator.³⁷ This technology was initially used to emulate out-of-print games for older consoles.³⁸ Eventually, programmers created emulators and ROMs for current gaming systems, including the Sony Playstation.³⁹ This led to the first major lawsuit over emulation.⁴⁰

Despite the historically rigid application of the transformative use test, recent cases addressing fair use of copyrighted images over the Internet suggest that courts are willing to allow activities that do not intuitively seem to constitute a transformative use. In *Kelly v. Arriba Soft Corp.*, Arriba operated an online search engine that displayed search results in the form of thumbnail images.⁴¹ Arriba obtained these images by copying them from other websites.⁴² Specifically, Arriba developed a program known as a “crawler” that

33. 17 U.S.C. § 104(2) (providing copyright protection to material that is first published in a foreign nation that is a treaty party). Japan is a treaty party under the Berne Convention. Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, 25 U.S.T. 1341, 1161 U.N.T.S. 30 (as last revised July 24, 1971) (listing the signatories to the Act).

34. *Midway Mfg. Co. v. Artic Int'l, Inc.*, 704 F.2d 1009, 1014 (7th Cir. 1983).

35. The Scribe, *The History of Emulation*, http://www.zophar.net/articles/art_14-3.html (last visited Oct. 19, 2006).

36. Jeffrey S. Libby, *The Best Games in Life Are Free?: Videogame Emulation in a Copyrighted World*, 36 SUFFOLK U. L. REV. 843, 844 (2003).

37. *Id.* at 846-47.

38. See Wikipedia.org, *Console Emulator*, http://en.wikipedia.org/wiki/Console_emulator (last visited Oct. 19, 2006) (discussing the importance of the release of the Nintendo Entertainment System emulator NESTicle in 1997).

39. Libby, *supra* note 36, at 849-50.

40. *Id.* (discussing *Sony Computer Entm't Inc. v. Connectix Corp.*, 203 F.3d 596 (9th Cir. 2000)).

41. *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 815 (9th Cir. 2003).

42. *Id.*

crawls the Internet for images to place in the search engine's index.⁴³ The crawler program downloaded original images to Arriba's server, and then created smaller, lower-resolution thumbnails of those images.⁴⁴ A person using the search engine could click on the thumbnail to view a larger version, also a copy stored on Arriba's website.⁴⁵ Kelly, the plaintiff, was a photographer whose copyrighted images were displayed on the defendant's search engine.⁴⁶

The Court of Appeals for the Ninth Circuit examined Arriba's use of the images under the four factors of § 107, focusing on the transformative use test.⁴⁷ Kelly argued that Arriba added nothing to the original, so the crawler could not qualify as transformative use.⁴⁸ The court rejected this argument because it believed the case concerned "more than merely a retransmission of Kelly's images in a different medium."⁴⁹ The court found that the thumbnail images "served an entirely different function than Kelly's original images."⁵⁰ The original images were "artistic works intended to inform and engage the viewer in an aesthetic experience," but the thumbnail images served no aesthetic purpose.⁵¹ The thumbnails simply functioned as a tool for searching images on the Internet.⁵² Ultimately, the court found that "[b]ecause Arriba's use is not superseding Kelly's use but, rather, has created a different purpose for the images, Arriba's use is transformative."⁵³

Furthermore, the Ninth Circuit noted that use of the thumbnails promoted the goals of the Copyright Act and the fair use doctrine of "promot[ing] creativity" and "preserv[ing] the potential future use of artistic works for purposes of teaching, research, criticism, and news reporting."⁵⁴ This was because the thumbnails "d[id] not supplant the need for the originals."⁵⁵ Finally, the court found that the thumbnails would not have an adverse effect on the market for the original, because the thumbnails "guide[d] users to

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.* at 818-22.

48. *Id.* at 818-19.

49. *Id.* at 819.

50. *Id.* at 818.

51. *Id.*

52. *Id.*

53. *Id.* at 819.

54. *Id.* at 820.

55. *Id.*

Kelly's web site rather than away from it" and were not sold or licensed to other parties.⁵⁶ Based on its finding that two fair use factors weighed in favor of Arriba, one weighed slightly in favor of Kelly, and one was neutral, the court concluded Arriba's use of the thumbnail images was fair use.⁵⁷

C. Applying Fair Use to Translated Materials

Courts have also applied the fair use factors to translated printed materials. In *Nihon Keizai Shimbun, Inc. v. Comline Business Data, Inc.*, the Court of Appeals for the Second Circuit examined English language abstracts translated from Japanese newspaper articles and published by the defendant.⁵⁸ The court first determined that, with two exceptions, the abstracts constituted copyright infringement.⁵⁹ One of the acceptable abstracts deviated from the "direct, if not word-for-word, translations of the . . . articles, edited only for clarity" and instead reported the same facts as the original but "in a different arrangement, with a different sentence structure and different phrasing."⁶⁰ Second, the court analyzed whether the abstracts constituted fair use.⁶¹ The court rejected the argument that the abstracts were transformative because they were "for the most part direct translations of [the original] articles; defendants added almost nothing new in their works."⁶² The court found that two out of the other three § 107 factors also weighed against fair use.⁶³ Although the court's application of the four-factor test to a newspaper article was fairly straightforward, the unique nature of translated fictional works suggests that applying the test to video games and manga will be more complicated.⁶⁴

56. *Id.* at 821.

57. *Id.* at 822.

58. *Nihon Keizai Shimbun, Inc. v. Comline Bus. Data, Inc.*, 166 F.3d 65, 69 (2d Cir. 1999).

59. *Id.* at 71.

60. *Id.*

61. *Id.* at 72.

62. *Id.*

63. *Id.* at 73.

64. See discussion *infra* Part II.A.

II. PREVENTING LOSS IN TRANSLATION: THE BIRTH AND EVOLUTION OF MANGA AND VIDEO GAME FAN TRANSLATIONS

A. Traditional Translation Problems

Translations between Japanese and English present unique challenges to the translator. Even official translations are often problematic, especially with regard to fictional works grounded in cultural knowledge.⁶⁵ When the first part of *The Lord of the Rings* trilogy, *The Fellowship of the Ring*, was released in Japanese theaters in March 2002 with Japanese subtitles, many fans protested the subtitles' perceived inadequacy.⁶⁶ Despite the Japanese distributor's use of a well-known subtitle translator, many fans complained about the translator's lack of understanding of "the whole nature of Tolkien's mythical epic story."⁶⁷ The subtitles often misportrayed central characters.⁶⁸ As a result, thousands of fans signed a petition complaining about the translation, which was sent to both the Japanese distributor and to *The Lord of The Rings* director Peter Jackson himself.⁶⁹ In response, Jackson agreed to hire a new Japanese translator for the second film in the trilogy.⁷⁰

Official translations of materials from Japanese to English often suffer from similar quality problems. Video games originally published in Japan have long been infamous for nonsensical translations.⁷¹ One famous example is from the 1989 Japanese shooting game *Zero Wing*. The game was translated into English for a European home game console and contained lines like "all your base

65. See, e.g., Minako O'Hagan, *Middle Earth Poses Challenges to Japanese Subtitling*, 12 GLOBALIZATION INSIDER, Mar. 18, 2003, available at <http://www.translationdirectory.com/article441.htm> (discussing problems translating *The Lord of the Rings* film series into Japanese).

66. *Id.*

67. *Id.*

68. To many Japanese fans, the most egregious error was changing an exchange between Frodo, the main character, and Borormir. Posting of Tehanu to TheOneRing.Net, Bad News from Japan, http://www.theonering.net/archives/special_reports/12.27.02-1.02.03 (Dec. 27, 2002, 15:42 EST). For example, Frodo's line "You are not yourself" in the original English script was changed to "You are a liar!" in the Japanese subtitles. O'Hagan, *supra* note 65. Fans believed this gravely mischaracterized Boromir as "a dishonest character," something completely unintended in the original. *Id.*

69. O'Hagan, *supra* note 65.

70. Geoff Botting, *Rings Fans Put 'Subtitles Queen' to Sword*, JAPAN TIMES ONLINE, Jan. 12, 2003, <http://search.japantimes.co.jp/member/member.html?fd20030112tc.htm>.

71. For a website completely devoted to poor video game translations, see Zany Video Game Quotes, <http://zanyvgquotes.com> (last visited Oct. 19, 2006).

are belong to us” and “you have no chance to survive make your time!”⁷² Video game players can appreciate the humor of these poor translations when the translation does not affect the actual game play, such as in shooting games like *Zero Wing*. The more serious translation problems are found in role playing games (RPGs), where the text, and thus the translation, plays a vital role in the gaming experience.⁷³ RPGs feature interactive narratives in which the player’s choices shape the story’s outcome.⁷⁴ RPGs are often compared to interactive novels or films, because the story and the characters are an integral part of the experience.⁷⁵ Thus, translating RPGs from Japanese to English presents many of the problems of translating a film or a novel, and this is reflected in the official translations of these games.

The *Final Fantasy* series, perhaps the most popular Japanese RPG franchise in the United States,⁷⁶ has suffered from poor Japanese to English translations.⁷⁷ In *Final Fantasy IV*, released as *Final Fantasy II* in the United States in 1991, the translation contained serious errors and eliminated much depth from the storyline.⁷⁸ For example, the original Japanese script contained some Judeo-Christian religious imagery as well as references to death which were all removed in the English translation.⁷⁹ The English script is substantially shorter than the original Japanese version, in part because several subplots revealing the motivations of central characters were removed.⁸⁰ In addition, the dialog contained some glaring translation errors, such as one character’s exclamation of “you

72. Frank Provo, *Zero Wing Genesis FAQ* (2001), http://db.gamefaqs.com/console/genesis/file/zero_wing.txt.

73. See Wikipedia.org, *Computer Role-playing Game*, http://en.wikipedia.org/wiki/Computer_role-playing_game (last visited Oct. 27, 2006) (describing the importance of the story and character development to RPGs); see also Wikipedia.org, *Fan translation*, http://en.wikipedia.org/wiki/Fan_translation (last visited Oct. 27, 2006) (partially listing fan-translated Japanese games, the vast majority of which are RPGs).

74. Wikipedia.org, *Computer Role-playing Game*, *supra* note 73.

75. *Id.*

76. See Steve Butts, *Final Fantasy XI* (Aug. 1, 2003) <http://pc.ign.com/articles/431/431547p1.html> (describing the anticipation in the United States for the eleventh installment of the “wildly popular” *Final Fantasy* series); see also Square Enix North America, *Final Fantasy*, <http://www.square-enix.com/na/title/ff> (last visited Oct. 27, 2006) (calling *Final Fantasy* “[t]he best selling RPG series in the world”).

77. See, e.g., Wikipedia.org, *Final Fantasy IV*, http://en.wikipedia.org/wiki/Final_Fantasy_IV (last visited Oct. 19, 2006); Wikipedia.org, *Final Fantasy VI*, http://en.wikipedia.org/wiki/Final_fantasy_vi (last visited Oct. 19, 2006).

78. Wikipedia.org, *Final Fantasy IV*, *supra* note 77.

79. *Id.*

80. *Id.*

spoonly bard.”⁸¹ In 1997, the game was re-released as Final Fantasy IV in the United States with a new translation that restored most of the changes from the original Japanese version.⁸²

B. Growth of Online Unofficial Translations

Due to frustration with official translations, fans with knowledge of both Japanese and English resorted to making their own translations and publishing them online.⁸³ Two common targets for fan translations are (1) Japanese video games, converted into a ROM with the fan translation embedded in the data or code, and (2) printed material like manga,⁸⁴ with the English translation published online either with or without scans of the accompanying comic panels.

1. Video Game Emulation

With a growing fan base for Japanese RPGs in the United States, fans became disappointed that some of the most renowned RPGs would not be released in America.⁸⁵ This led to a push to encode and translate unreleased games.⁸⁶ The first fan translations can be traced back to 1993.⁸⁷ Since then, dozens of games have been released as translated ROMs, the most famous examples involving RPGs.⁸⁸ The Final Fantasy series gained popularity in the United States during the 1990s, particularly with the release of Final Fantasy VII in 1997.⁸⁹ An older game in the series, Final Fantasy V, had not been released outside of Japan, however.⁹⁰ In 1997, a group of fans, known as RPGe, set out to translate the five year old game.⁹¹ The original Japanese version had already been encoded and published on the Internet as a ROM, so RPGe developed a patch that would replace original Japanese text with its English translation.⁹² The patch was

81. *Id.*

82. *Id.*

83. Wikipedia.org, Fan translation, *supra* note 73.

84. “Manga” is generally translated as “Japanese comic books.” *See, e.g.*, Wikipedia.org, Manga, <http://en.wikipedia.org/wiki/Manga> (last visited Oct. 19, 2006).

85. Wikipedia.org, Fan translation, *supra* note 73.

86. *Id.*

87. *Id.*

88. *See, e.g.*, Wikipedia.org, Final Fantasy VII, http://en.wikipedia.org/wiki/Final_Fantasy_VII (last visited Oct. 19, 2006).

89. *See id.*

90. *See* Wikipedia.org, Fan translation, *supra* note 73.

91. *Id.*

92. *See id.* (describing the origins of the Final Fantasy V patch).

released the same year and was one of the first complete translation patches.⁹³ RPGe eventually produced translation patches for eight different games before disbanding in 1999.⁹⁴

One of the most difficult fan translation projects was the game *Seiken Densetsu 3*.⁹⁵ The game featured multiple plotlines as well as a complex compression algorithm, both of which present significant challenges to translation.⁹⁶ A translation patch was released in 2000, five years after the game was originally released in Japan.⁹⁷ An official English language version has never been released in the United States, but the patched ROM continues to be a popular download today.⁹⁸ *Seiken Densetsu 3* is still seen as a milestone in fan translation history.⁹⁹ Fan translation projects continue today, some for games that have been available for nearly a decade in Japan.¹⁰⁰

2. Manga

American fans of anime¹⁰¹ were similarly frustrated with the lack of official releases of anime and their corresponding manga.¹⁰² This frustration sparked a parallel movement of unofficial translations and distributions of manga and anime.¹⁰³ Although many anime series were translated, subtitled, and distributed on videotapes as “fansubs” through a network of distribution sites, fan translations of manga evolved more slowly.¹⁰⁴ Some speculate that manga were first translated by bilingual Japanese fans with friends living in the United States, who scanned and translated manga pages as a favor for

93. *Id.*

94. Wikipedia.org, RPGe, [http://en.wikipedia.org/wiki/RPGe_\(translation_group\)](http://en.wikipedia.org/wiki/RPGe_(translation_group)) (last visited Oct. 19, 2006).

95. Wikipedia.org, *Seiken Densetsu 3*, http://en.wikipedia.org/wiki/Seiken_Densetsu_3 (last visited Oct. 19, 2006).

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. For example, in 2004, fan translation groups finished games like *Star Ocean: Fantastic Space Odyssey* and *Front Mission: Gun Hazard*, *Koryu no Mimi*, originally published in 1995 and 1996. Wikipedia.org, Fan translation, *supra* note 73.

101. Anime is Japanese animation. Wikipedia.org, Anime, <http://en.wikipedia.org/wiki/Anime> (last visited Oct. 19, 2006). In Japan, most anime television series originate from manga. *See id.*

102. *See* Wikipedia.org, Scanlation, <http://en.wikipedia.org/wiki/Scanlations> (last visited Oct. 27, 2006) (stating fan translations of manga began because manga was not officially released in the United States).

103. *Id.*

104. *Id.*

the American fans.¹⁰⁵ These practices eventually grew into projects that mirrored the fan translation groups for video games.¹⁰⁶

Similar to those video game projects, “scanlations” (scanning and translating manga) were motivated either by the unavailability of the manga in the United States or by the poor quality of the official translation.¹⁰⁷ The United States version of the Dragon Ball series, for example, was edited to target a younger audience than the original.¹⁰⁸ Like Final Fantasy IV, fan demand eventually led to the release of a new uncut version of the manga.¹⁰⁹ Unofficial translations of manga offer American audiences an opportunity to read a series as soon as it is released in Japan, and to discover classic manga series that are not seen as commercially viable in the United States.¹¹⁰ Due to the nature of the Japanese manga market, it is almost impossible for American distributors to replicate its success in the American anime market.¹¹¹ Manga is immensely popular in Japan, and includes an inestimable number of series.¹¹² In 1995 alone, 1.9 billion manga were sold.¹¹³ Based on the population at the time, this averages to 15 purchases for every Japanese citizen.¹¹⁴ Manga are nearly as popular and as accepted as novels and films in Japan.¹¹⁵ Manga also encompass numerous genres, many of which are overlooked by American publishers in favor of genres they perceive to be more commercially viable or that correspond with anime series that have been successful in the United States.¹¹⁶

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. Wikipedia.org, Dragon Ball, http://en.wikipedia.org/wiki/Dragon_Ball (last visited Oct. 19, 2006).

110. Wikipedia.org, Scanlation, *supra* note 102.

111. See FREDERIK L. SCHODT, DREAMLAND JAPAN: WRITINGS ON MODERN MANGA 19-20 (3d prtg. 2002) (describing the prevalence of manga in Japanese culture).

112. *Id.*

113. *Id.* at 19.

114. *Id.*; see also Ministry of Internal Affairs and Communications, Table 1, Population, Population Change, Area, and Population Density of Japan: 1920 to 2000, <http://www.stat.go.jp/english/data/kokusei/2000/final/hyodai.htm> (last visited Oct. 19, 2006) (containing data from the Japanese census).

115. SCHODT, *supra* note 111, at 19.

116. Japanese manga categories include: “*shōnen* (‘boys’), *shōjo* (‘girls’), *redisu* (‘ladies’), *seijin* (‘adult’ as in ‘erotic manga for men’), and *seinen* (‘young men’).” *Id.* at 95-96. Most manga distributed in the United States is *shōnen* manga, such as Dragon Ball, which targets young and teenage boys. *Cf. id.* at 326 (noting that American manga layouts are similar Japanese male manga, as the “distinctively different layouts of women’s manga make them much more difficult to emulate”).

Developing fan translations of manga is considerably simpler than translating video games. Fan translations can be completed with a scanner and Photoshop, or a comparable software program.¹¹⁷ First, an original copy of the manga, called a “raw,” is scanned into a computer.¹¹⁸ The scan is then distributed to a fan translator, who sends a draft of the script to another person for editing.¹¹⁹ After the “editor” cleans up the language, the new translation is superimposed into the panels and word bubbles of the scan.¹²⁰ The fan translator can then distribute the translated version online.¹²¹ Favorite methods of distribution include chat networks, peer-to-peer technologies, and direct download from websites.¹²²

C. Potential Legal Developments for Fan Translations

Despite the increase in fan translations for both video games and manga, there has been no litigation over these unofficial translations. Therefore, the fair use factors, including the transformative use test outlined by the Supreme Court in *Campbell*,¹²³ have never been applied to fan translations. Although the original sources of these fan translations generally have not been considered commercially viable, this may change with regard to older video games. Currently, hundreds of licensed older video games are available online for download on GameTap for a monthly fee.¹²⁴ Its catalog includes twenty-seven RPGs, with new games added each week.¹²⁵ At this time, GameTap does not offer any games originally released on Nintendo’s consoles, which were the main target for fan translations.¹²⁶ Furthermore, GameTap appears to only offer games previously released in the United States.¹²⁷ If the market for older

117. See Wikipedia.org, Scanlation, *supra* note 102.

118. *Id.*

119. *Id.*

120. Jeff Yang, *Asian Pop: Manga Nation*, SFGATE.COM, June 14, 2004, <http://sfgate.com/cgi-bin/article.cgi?file=/g/archive/2004/06/14/manganation.DTL>.

121. *Id.*

122. *Id.*

123. See discussion *supra* Part I.A.

124. GameTap, <http://www.gametap.com> (last visited Oct. 19, 2006).

125. GameTap, Browse Games, http://www.gametap.com/home/game_titles/browseTitles.jsp?title=Title&type=Role-Playing&system=System&publisher=Publisher&x=31&y=23 (last visited Oct. 19, 2006).

126. See *id.* (showing GameTap’s filter by system feature, which does not include any Nintendo consoles); see also Wikipedia.org, Fan translation, *supra* note 73.

127. See GameTap, Browse Games, *supra* note 125 (listing games available for download).

games continues to grow, however, GameTap could work with video game developers to release new English versions of classic games.

In addition, Nintendo, arguably the company with the largest back catalog of downloaded ROM games, recently released its latest console, the Wii, which is capable of playing virtually all of the games released on the older Nintendo systems using downloaded ROM images.¹²⁸ Nintendo will be re-releasing titles it produced for three different consoles, and it is in talks with third party developers to release their games as well.¹²⁹ This back catalog would encompass thousands of games.¹³⁰ The download service, called the Virtual Console, will attempt to be the gaming equivalent of iTunes.¹³¹ Although Nintendo has not announced which games will be re-released for the Virtual Console, the company has shown demos of the classic action games Super Mario Bros., Super Mario 64, and Sonic the Hedgehog.¹³² There will be a per-game fee associated with this feature, however.¹³³ If Nintendo releases official versions of fan-translated games, it may choose to pursue legal action against those responsible for making and distributing unofficial translations.

Likewise, Japanese manga publishers are increasingly more willing to challenge fan translators. In 2004, Kodansha, Ltd., a major Japanese publisher, sent "cease and desist" letters to one website known for distributing manga fan translations.¹³⁴ This suggests the possibility of future litigation over fan translations. Therefore, it is important to consider how prior applications of the fair use doctrine to translated materials in cases like *Nihon Keizai Shimbun* would be

128. Chris Morris, *Nintendo's Revolution-ary Plans*, CNNMONEY.COM, Sept. 15, 2005, http://money.cnn.com/2005/09/15/commentary/game_over/revolution/index.htm. The Wii console was codenamed Revolution. *Id.*

129. Matt Casamassina, E3 2006: Hudson Declares 100 Games for Wii (May 11, 2006), <http://wii.ign.com/articles/708/708057p1.html>; Morris, *supra* note 128.

130. See Chris Morris, *Nintendo, Sega Team for Gaming iTunes Service*, CNNMONEY.COM, Mar. 24, 2006, http://money.cnn.com/2006/03/23/commentary/game_over/gdc_nintendo (stating Nintendo plans to offer one thousand previously released games by developers Sega and Hudson Software in addition to virtually every game developed by Nintendo itself).

131. *Id.*

132. Matt Casamassina, *Virtual Console Prices Revealed* (June 7, 2006), <http://wii.ign.com/articles/711/711629p1.html>. As of September 2006, Nintendo plans to release thirty games for the Virtual Console by the end of 2006, subsequently releasing ten additional games each month. Fils-Aime Talks American Launch and More, THE WIIRE, Sept. 14, 2006, http://www.thewiire.com/news/473/1/FilsAime_Talks_American_Launch_and_More. For more information about the structure and pricing of the Virtual Console, see *id.*

133. Casamassina, *supra* note 129.

134. Wikipedia.org, Scanlation, *supra* note 103.

applied to these new situations. Such consideration reveals some potential shortcomings of the transformative use test.

III. THE END AND GAME OVER: APPLYING THE FAIR USE FACTORS WITH THE CURRENT TRANSFORMATIVE USE TEST

A. *Why This Matters*

Both manga and video games, particularly those without an official U.S. release, serve niche markets. Fan translations in some form have been distributed online arguably since the Internet was first created. As of yet there has been no litigation over the potential copyright infringement in these markets. Courts may soon be called upon to evaluate this media under the fair use doctrine, however, because it may influence unofficial translations in more mainstream media, such as with the *Harry Potter* book series.¹³⁵ While official translators in China worked to translate *Harry Potter and the Half-Blood Prince* from English into Chinese, fan translations of the first twelve chapters were posted online within weeks of the book's release in England and the United States.¹³⁶ Instead of waiting three months for the official Chinese version to hit stores, Chinese *Harry Potter* fans could read a fan-translated version online for free at nearly the same time as the book was available for English-speaking fans.¹³⁷ Fan translations sparked a similar controversy two years earlier with the release of *Harry Potter and the Order of the Phoenix*.¹³⁸ A representative from China's State Press and Publication Administration stated that the fan translators would only be investigated when the owner of the copyright of the book files suit.¹³⁹ Although *Harry Potter* author J.K. Rowling issued a statement that she will permit online fan translations,¹⁴⁰ these translations could also be used to produce pirated books.¹⁴¹ Other authors may not share Rowling's view of fan translations and may instead choose to pursue legal action.

135. See Joel Martinsen, *Can Chinese Fans Translate Harry Potter?*, DANWEI, Aug. 11, 2005, <http://www.danwei.org/archives/002108.html>.

136. *Potter Translation Pushes Ahead*, SHANGHAI DAILY NEWS, July 29, 2005, http://news.xinhuanet.com/english/2005-07/29/content_3282666.htm.

137. *Id.*

138. *Online Potter Translation Sparks Legal Controversy*, CHINA DAILY, July 30, 2003, http://www.chinadaily.com.cn/en/doc/2003-07/30/content_250155.htm.

139. *Id.*

140. Martinsen, *supra* note 135.

141. *Potter Translation Pushes Ahead*, *supra* note 136.

Furthermore, both the manga and video game markets are rapidly expanding. Officially translated manga, once relegated to a hidden shelf in comic book stores, are now widely available at large national bookstore chains like Barnes & Noble.¹⁴² In 1992, Satoru Fujī, an executive at VIZ, an American company that publishes and distributes translated manga,¹⁴³ believed that most Americans did not like manga. He stated, “[t]o 90 percent of comics fans, manga are a foreign medium, with different artwork, different sequences, and different stories.”¹⁴⁴ Three years later, a *New York Times* article estimated that sales of manga in the United States in 1994 were up to around \$10 million.¹⁴⁵ Japanese publishers believed the figure for translated manga was closer to \$5 or \$6 million, however.¹⁴⁶

Regardless of the actual revenue, most in the industry agreed that, by 1995, sales of manga were “growing rapidly, mainly because of the popularity of anime.”¹⁴⁷ In 2003, sales in the United States soared to \$165 million, and then to \$207 million in 2004.¹⁴⁸ Several American newspapers, including the *Los Angeles Times* and the *Seattle Post-Intelligencer*, added a translated manga strip to their comic sections in 2006, with more newspapers expected to follow suit in 2007.¹⁴⁹ If Americans become as familiar with manga as they are with sushi, it is conceivable that publishers will start to closely scrutinize fan translations of popular manga.¹⁵⁰

Video games are experiencing similar integration into mainstream America. From the late 1990s to the early 2000s, video games in the United States have transitioned from a “minority activity . . . to mass entertainment.”¹⁵¹ Half of the United States

142. Barnes&Noble.com devotes a subsection of fiction and graphic novels and comic books on its website to manga. See Barnes&Noble.com, Book Browser, Graphic Novels and Comic Books, Manga, <http://browse.barnesandnoble.com/browse/nav.asp?z=y&bncatid=1133350&visgrp=fiction> (last visited Oct. 19, 2006). It encompasses several genres such as action and adventure, historical, and horror manga. *Id.* The manga section contained 4,337 titles as of October 19, 2006. *Id.*

143. Viz Media, <http://www.viz.com/about> (last visited Oct. 19, 2006).

144. SCHODT, *supra* note 111, at 338.

145. *Id.*

146. *Id.*

147. *Id.*

148. Carol Memmott, *Japanese Manga Takes Humongous Step*, USA TODAY, July 6, 2005, at 4D, available at http://www.usatoday.com/life/books/news/2005-07-05-japanese-manga_x.htm.

149. Carol Memmott, *Comics Pages Make Room for Manga*, USA TODAY, Dec. 29, 2005, at 1D, available at http://www.usatoday.com/life/books/news/2005-12-28-manga_x.htm.

150. *Id.*

151. *Chasing the dream – Video gaming*, THE ECONOMIST, Aug. 6, 2005.

population plays computer or console video games.¹⁵² Estimates assert that 76% of players are under 40, and the average player age is 30.¹⁵³ “An entire generation that began gaming as children has kept playing.”¹⁵⁴ Video game sales in America continue to rise: in 2005, sales of video game software and hardware were over \$10.5 billion, an increase from \$9.9 billion in 2004.¹⁵⁵ RPGs also show increased sales. Final Fantasy X was the first PlayStation 2 game to sell four million units,¹⁵⁶ exceeding the sales of earlier Final Fantasy games.¹⁵⁷

Square Enix, the publisher of the popular Final Fantasy and Dragon Quest RPG series, is also exploring the viability of earlier Super Nintendo-era RPGs in the retail market. For example, Square Enix reissued Final Fantasy IV, one of the earliest fan-translated games, in December 2005 for the GameBoy Advance, with a retail price of \$29.99.¹⁵⁸ The updated game contains a much better translation than the original release and added some extra features.¹⁵⁹ New versions of Final Fantasy V and VI are also in development for the GameBoy Advance.¹⁶⁰ In addition, Final Fantasy III, which has never been released in the United States, is in development for the Nintendo DS.¹⁶¹ With increased commercial viability of older, previously unmarketable games, video game publishers may decide fan translations pose a threat to these new releases. Currently, companies rarely pursue legal action beyond issuing “cease and desist” demands to websites engaged in ROM distribution.¹⁶² Companies may have reasoned that litigation costs would far exceed any potential damages because companies are no longer profiting from the vast

152. *Id.*

153. *Id.*

154. *Id.*

155. *Video Game Set Sales Record in 2005*, CNNMONEY.COM, Jan. 14, 2006, <http://money.cnn.com/2006/01/13/technology/personaltech/gamesales>.

156. Giancarlo Varanini, Final Fantasy X Sales Meet Expectations (Jan. 30, 2002), <http://www.gamespot.com/ps2/rpg/finalfantasy10/news.html?sid=2843955>.

157. Wikipedia.org, Final Fantasy X, http://en.wikipedia/wiki/Final_Fantasy_X (last visited Oct. 19, 2006).

158. Jeremy Dunham, Final Fantasy IV Advance (Dec. 14, 2005), <http://gameboy.ign.com/articles/675/675632p1.html>; Gamepro.com, Final Fantasy IV Advance, http://www.gamepro.com/nintendo/gameboy_advance/25576/info.shtml (last visited Oct. 19, 2006).

159. See Dunham, *supra* note 158.

160. Anoop Gantayat, Final Fantasy V & VI Set for GBA (Oct. 5, 2005), <http://gameboy.ign.com/articles/656/656170p1.html>.

161. *Id.*

162. Wikipedia.org, Rom Image, http://en.wikipedia.org/wiki/ROM_image (last visited Oct. 19, 2006).

majority of distributed games.¹⁶³ In the context of games never exported by Japanese developers, this argument is particularly strong. As companies like Nintendo and Square Enix test the marketability of these older games by releasing them for portable consoles like the GameBoy Advance, however, the new market for these games may justify the litigation costs.

B. Potential Problems with the Current Transformative Use Test

First, courts must determine whether fan translations are copyright infringements. Section 106 of the Copyright Act gives copyright holders the exclusive right “to prepare derivative works.”¹⁶⁴ Because derivative works include translations,¹⁶⁵ copyright holders hold exclusive rights to translate their original works. Furthermore, translations of literary and artistic works are protected by Article 8 of the Berne Convention, which granted authors “the exclusive right of making and of authorizing the translation of their works throughout the term of protection of their rights in the original works.”¹⁶⁶ Manga clearly qualify as artistic works, and video games arguably qualify as well. Even if video games are not artistic works, other precedent indicates that a court would find unauthorized translations of video games to constitute copyright infringement.¹⁶⁷ Although the Second Circuit’s reasoning in *Nihon Keizai Shimbun* concerned translations of newspaper articles,¹⁶⁸ the court found that “direct, if not word-for-word, translations of the . . . articles, edited only for clarity” infringe, whereas reporting the same facts as the original “in a different arrangement, with a different sentence structure and different phrasing” is not infringement.¹⁶⁹ Under this test, fan translations probably infringe because a good fan translator strives for a perfect translation of the original source material, particularly when the fan translation is trying to fix a poor official translation or restore censored material. Fan translations are presumptively illegal, therefore, unless they qualify for the fair use defense.

Although courts have not yet applied the four § 107 factors to fan-translated manga or video games, it is possible to apply the legal

163. *Id.*

164. 17 U.S.C. § 106(2) (2000).

165. *Id.* § 101.

166. Berne Convention, *supra* note 33, art. 8.

167. See *Nihon Keizai Shimbun, Inc. v. Comline Bus. Data, Inc.*, 166 F.3d 65, 71 (2d Cir. 1999) (holding direct translations are copyright infringements).

168. *Id.* at 69.

169. *Id.* at 71.

analysis in cases like *Campbell*, *Leibovitz*, and *Nihon Keizai Shimbun* to predict how a court might rule. Using this line of precedent and the current transformative use test, neither fan-translated manga nor video games would likely satisfy the requirements of the fair use defense. Although this result may be justified with regard to fan-translated manga, video games seem to present a harder problem. The Supreme Court has long emphasized that courts must analyze fair use on a case-by case basis without simplifying the process with bright-line rules.¹⁷⁰ Lower courts' applications of the Supreme Court's holding in *Campbell* and *Leibovitz* suggest that they are in fact using a bright-line rule for transformative use, however, and occasionally struggling to come to a just result within these confines.¹⁷¹ The purpose of the fair use doctrine is to "permit courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster."¹⁷² Arguably, applying the current transformative use test to fan-translated video games will produce that undesirable result.

1. The Easier Case: Fan-Translated Manga

a. Purpose and Character of the Use

Courts look at two considerations when analyzing the purpose and character of the use: (1) whether the new work serves a commercial or nonprofit education purpose and (2) to what extent the use is transformative.¹⁷³ Although fan-translated manga are not generally sold for profit, any arguments that they serve an educational purpose would be farfetched. Thus, the key question is how much, or to what extent, the fan translation transforms the original manga. To make this determination, courts use the *Campbell* test: "whether the new work merely 'supersede[s] the objects' of the original creation, or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message."¹⁷⁴

170. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994).

171. *See, e.g., Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 815 (9th Cir. 2003) (holding thumbnail images of copyrighted material constitute a transformative use because the thumbnails served a different purpose than the original images).

172. *Id.*

173. *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1269 (11th Cir. 2001).

174. *Campbell*, 510 U.S. at 579 (citations omitted).

The purpose of fan-translated manga is likely to merely supersede the original. For example, scanlations are used to supplant the original manga by simply superimposing the English translation over the original Japanese text. Their purpose is to allow access to an English-speaking audience, but they do not change the original works in any way, other than the text. The translations do not strive to add something new to the original manga. When a fan translation tries to correct a poor English translation, the argument against the translation is even stronger. Often, the official translation alters the original Japanese version by taking out adult subtext or changing the dialogue to make it more child-friendly.¹⁷⁵ In these cases, the fan translation seeks to reinstate the original meaning and intent of the Japanese version as much as possible. It does not alter the original art in any way, which is arguably a far more important element than the words next to the art.¹⁷⁶ Therefore, fan-translated manga cannot be properly characterized as “transformative” under the Court’s definition in *Campbell*.

b. Nature of the Copyrighted Work

The second factor also weighs against fair use. The traditional analysis determines where the copyrighted work falls on the “hierarchy of copyright protection in which original, creative works are afforded greater protection than derivative works or factual compilations.”¹⁷⁷ Because manga are original and creative works, they are entitled to a greater degree of protection. Furthermore, when compared to traditional fictional works, manga are unique in that they are graphics-driven rather than text-driven. The impact of manga comes from the art, not the text.¹⁷⁸ Character design, not the script, is

175. See Wikipedia.org, Dragon Ball, *supra* note 109 (discussing editing changes in the English language version).

176. The importance of art versus story in manga is discussed extensively in the next section. See discussion *infra* Part III.B.1.b.

177. *Suntrust*, 268 F.3d at 1271.

178. For example, Graphic-Sha, a Japanese publisher, issued a 38 volume series on how to draw manga, covering such varied topics as ninja and samurai, enhancing a character’s sense of presence, and sexy sports wear. See generally TEAM ESAKA, HOW TO DRAW MANGA VOLUME 38: NINJA & SAMURAI PORTRAYAL (2005); HIKARU HAYASHI & KIMIKO MORIMOTO, HOW TO DRAW MANGA VOLUME 35: COSTUME ENCYCLOPEDIA VOLUME 3: SEXY SPORTS WEAR (2005); GO OFFICE, MORE HOW TO DRAW MANGA VOLUME 3: ENHANCING A CHARACTER’S SENSE OF PRESENCE (2004). In comparison, a search on Amazon.com for “how to write manga” produced only one accurate result. See Amazon.com, <http://www.amazon.com> (search “Search Amazon.com” for “how to write manga”; then follow “Shoujo Manga Techniques: Writing Stories” hyperlink). Note also that this book was written specifically for shōjo, young girls’ manga, not manga in general. *Id.*

of fundamental importance.¹⁷⁹ Text is secondary to the illustrations.¹⁸⁰ The art seems to do nearly all the work in the majority of manga, establishing the reader's relationship with the characters and driving the action in the story. Manga are meant to be cinematic, "a visualized narrative with a few words tossed in for effect."¹⁸¹ Thus, even if translating the text alters themes or the target audience of the original, it does little to change the original's character and purpose. It does not alter the original manga "with new expression, meaning, or message,"¹⁸² but simply allows an English-speaking audience to better understand what is going on. Using the traditional analysis, therefore, the second factor also weighs against fair use.

c. Amount and Substantiality of the Used Portion

"[T]he amount and substantiality of the portion used in relation to the copyrighted work as a whole"¹⁸³ depends in part on whether the fan translation is a scanlation or a translation of the text only. Either way, however, this factor likely weighs against fair use. Scanlations replicate and distribute entire manga, complete with illustrations. As argued above, it is the artwork that should be afforded the greatest protection, so the third factor also clearly weighs against fair use in those cases. Online distribution of the fan-translated text without the accompanying artwork involves only a

179. Even a book instructing budding manga artists on how to create shōjo manga begins with the importance of art:

Shoujo has a unique look, making it the most internationally recognized style of manga. It's instantly appealing. Why is that? That is the question we must answer in order to successfully draw in the shoujo style and create winning characters. Shoujo characters are typically young, sweet, pretty, enchanting, cute, and magical. They abound with charm and charisma. And, it's the artist's job to translate these descriptions into figures.

CHRISTOPHER HART, MANGA MANIA SHOUJO: HOW TO DRAW THE CHARMING AND ROMANTIC CHARACTERS OF JAPANESE COMICS 8 (2004). Note that the key to creating these "winning characters" is to translate these characteristics into the art itself, not to convey youth, sweetness, magical-ness, etc. with a moving story. Even the back cover declares, "*Draw the Delicate Romance of Shoujo!*" (emphasis added). *Id.*

180. Even the book on how to write stories for manga admits that "[i]t's almost impossible to write a brand new story that's completely different from everyone else's," so the author merely suggests "adding your own point of view or thoughts into the story" because the basic storyline will always be the same. MAKOTO ITSUKI, SHOUJO MANGA TECHNIQUES: WRITING STORIES 7-8 (2005). Ironically, the entire book is itself drawn and written as a manga, complete with two young, sweet, but only slightly magical female characters. *See generally id.*

181. SCHODT, *supra* note 111, at 26.

182. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994).

183. 17 U.S.C. § 107 (2000).

portion of the original that is secondary to the art itself. The translation encompasses the entire text of the manga, however, instead of simply referencing it.¹⁸⁴ Therefore, this factor also suggests that text translations, even without the accompanying artwork, do not constitute fair use.

d. Effect of the Use upon Potential Marketability

Finally, the fourth factor, “the effect of the use upon the potential market for or value of the copyrighted work,”¹⁸⁵ increasingly weighs against fair use. A court must consider both the extent of market harm caused by the individual alleged infringement, and “whether unrestricted and widespread conduct of the sort engaged in by the [alleged infringer] would result in a substantially adverse impact on the potential market.”¹⁸⁶ As the marketability of manga increases, free fan translations may pose a substantial threat to potential revenue. With scanlations, this effect is very clear, as Americans can view or download an entire manga, page by page. Although the resolution may be less than ideal, and the translation may be questionable, many Americans may be willing to sacrifice these considerations in order read manga for free. Even text-only fan translations may pose a threat because often the original, Japanese-language manga can be purchased for much less than the English language versions.¹⁸⁷ Taking all four fair use factors into consideration, including most importantly the lack of a transformative

184. See *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1271-72 (11th Cir. 2001) (applying the third factor to a parody that references *Gone with the Wind* by using several characters and revisiting much of the plot).

185. 17 U.S.C. § 107.

186. *Suntrust*, 268 F.3d at 1274 (quoting *Campbell*, 510 U.S. at 590).

187. For example, VIZ Media published the first fourteen volumes of *Basara*, a shōjo manga popular in Japan, in English, and they are available on Amazon.com for \$9.99 per volume. See Amazon.com, <http://www.amazon.com> (search “Search Amazon.com” for “Basara”) (last visited Oct. 19, 2006). The original Japanese language version costs \$5.30 to \$8.10 per volume when purchased online from Sasuga, a Japanese bookstore. See Sasuga Japanese Bookstore, <http://www.sasugabooks.com> (search “Quick Find” for “Basara”) (last visited Oct. 19, 2006). In addition, Japanese language manga are often sold in bundles at a reduced price. The entire 28 volume series *Rurouni Kenshin* is available as a set from Sasuga for \$160, which equals \$5.71 per volume. Sasuga Japanese Bookstore, <http://www.sasugabooks.com> (search “Quick Find” for “Rurouni Kenshin”) (last visited Oct. 19, 2006). Each volume on Amazon.com costs \$7.95. See Amazon.com, <http://www.amazon.com> (search “Search Amazon.com” for “Rurouni Kenshin”) (last visited Oct. 19, 2006). Although this may not seem like much of a price difference, when buying a manga series with over twenty volumes, the dollars add up quickly. Buying Japanese language manga and then using free online text-only fan translations can save quite a bit of money for the manga enthusiast.

use and the potential detrimental effect on marketability, courts likely would find that no form of fan-translated manga constitutes a fair use.

2. The Harder Case: Fan-Translated Video Games

It is more difficult to apply the fair use factors to unofficial translations of video games. Fan translations of manga, at their most basic level, only involve manipulations of words on a piece of paper. Video game fan translations involve modifications of binary ROM images of the games being translated.¹⁸⁸ This includes a process called ROM hacking or translation hacking.¹⁸⁹ Translation hacking targets the text of the game and changes it from the original Japanese into another language.¹⁹⁰ Other types of hacking may alter the graphics, levels, maps, or character properties.¹⁹¹ Translation hacking typically requires a variety of specialized tools to alter the game's data or the code itself.¹⁹² Once the text is changed, the fan translation is usually distributed in the form of a patch that can be applied to the original ROM.¹⁹³ Fan translators keep the translation as a separate file from the original to avoid problems of illegal distribution of a ROM image.¹⁹⁴ The patch only contains what has changed in the ROM—the new fan translation of the text—and thus does not distribute other portions of the original ROM image.¹⁹⁵ As a result, the patch is considerably smaller than a full ROM image.¹⁹⁶

Thus, before applying the fair use factors, a court must determine whether to analyze the translation patch or the patched ROM image. The patch itself is at issue, but it is useless without the original ROM. Although there has been no litigation over the legality

188. Wikipedia.org, Fan translation, *supra* note 73.

189. See Wikipedia.org, ROM Hacking, http://en.wikipedia.org/wiki/ROM_hacking (last visited Oct. 19, 2006).

190. *Id.*

191. *Id.* Such hacking requires a certain level of expertise, otherwise the results can be disastrous. See I-mockery.com, Disco Mario, <http://www.i-mockery.com/romhacks/discomario/default.php> (last visited Oct. 19, 2006) (reviewing the ROM hack "Disco Mario," complete with screenshots).

192. Wikipedia.org, ROM Hacking, *supra* note 189; see Wikipedia.org, Image:Top-develshot4.jpg, <http://en.wikipedia.org/wiki/Image:Top-develshot4.jpg> (last visited Oct. 19, 2006) (showing a screenshot of the process of fan translating the Super Nintendo game Tales of Phantasia from Japanese into Finnish).

193. Wikipedia.org, ROM Hacking, *supra* note 189.

194. *Id.*

195. *Id.*

196. *Id.*

of ROMs,¹⁹⁷ distributing un-hacked ROMs is arguably illegal under § 117 of the Copyright Act.¹⁹⁸ Section 117 allows owners of a computer program to make an additional copy as a backup, which would include a ROM image, but it does not allow them to distribute that copy.¹⁹⁹ Although emulation and ROM enthusiasts offer a long list of justifications for ROM distribution,²⁰⁰ it is unclear whether any have a legal basis.²⁰¹ Therefore, this section will apply the four factors to the patched ROM image.

a. Purpose and Character of the Use

As with manga, the first factor asks whether the use is transformative. The analysis for video games is complicated because it involves an addition of material to the original game. By changing the actual data or code of the game in order to incorporate the new English text, the fan translation arguably changes the character of the game more than a manga fan translation does. Transformative use is ultimately the most important question for the fair use analysis here, for although “transformative use is not absolutely necessary for a finding of fair use . . . the more transformative the new work, the less will be the significance of other factors.”²⁰² As will be discussed, the other factors, particularly the effect on marketability, are far less relevant for video games than manga. As stated in *Campbell*, the issue is whether a fan translation “adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message.”²⁰³ Although fan translations of video games alter the original more than a fan-translated manga, the

197. See generally *Sony Computer Entm't, Inc. v. Connectix Corp.*, 203 F.3d 596 (9th Cir. 2000) (holding an emulator that played Sony Playstation games was legal under a fair use rationale, as the use was “mildly transformative”).

198. See 17 U.S.C. § 117 (2000); see also Brian Flood, *Emulating the Classic Video Games: Protecting Copyright on the Internet*, 2000 SYRACUSE L. & TECH. J. 2 (discussing the legality of ROMs); Libby, *supra* note 36 at 855-57 (applying the four-factor fair use test to ROM distribution); Zvi Rosen, *Mod, Man, and Law: A Reexamination of the Law of Computer Game Modifications*, 4 CHI.-KENT J. INTELL. PROP. 196 (2005) (arguing that modifications of computer games should not be considered “mere derivative works”).

199. 17 U.S.C. § 117(a)-(b).

200. For example, some claim that games that are no longer commercially available have been abandoned by their copyright holders, and thus distribution of such games is legal. Wikipedia.org, *Rom Image*, *supra* note 162. Unlike trademarks, however, copyrights cannot become abandoned through lack of use. *Id.*

201. *Id.*

202. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

203. *Id.*

Campbell test indicates they probably do not qualify as a transformative use.

It is helpful to examine prior applications of the first factor to translated materials. The Court of Appeals for the Second Circuit in *Nihon Keizai Shimbun* rejected a transformative use argument for translations of newspaper articles because they were “for the most part direct translations of . . . [the original] articles; defendants added almost nothing new in their works.”²⁰⁴ Again, the goal with a good translation is not to add anything new to the story, but to remain true to the original intent of the game. In the case of games with official English language releases, the purpose of fan translations is to restore the content of original Japanese versions as much as possible.²⁰⁵ Therefore, it is hard to argue that the fan translation adds anything new for the purpose of the *Campbell* test. Although fan translations give new audiences access to a proper English translated version of a game, they are not meant to give the game a “further purpose” or “different character,” especially considering that § 106 of the Copyright Act explicitly gives copyright holders the right to release their games in a different language.²⁰⁶ Under the *Campbell* test for transformative use, this factor would weigh against legality.

b. *Nature of the Copyrighted Work*

Like manga, video games are original, creative works which should be afforded greater copyright protection.²⁰⁷ Unlike manga, the main source of fan-translated video games, RPGs, are primarily text-driven.²⁰⁸ Early RPGs had primitive graphics because of limited console technology, and so the game’s textual story became essential to the gaming experience.²⁰⁹ RPGs often contain intricate plots and

204. *Nihon Keizai Shimbun, Inc. v. Comline Bus. Data, Inc.*, 166 F.3d 65, 72 (2d Cir. 1999).

205. See, e.g., Wikipedia.org, Final Fantasy IV, *supra* note 77.

206. See 17 U.S.C. § 106(2) (2000).

207. See *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1271 (11th Cir. 2001).

208. Precursors to the modern RPG included online text-based role playing games and text-based adventure games, neither of which had any graphics at all. Wikipedia.org, Online Text-Based Role-Playing Game, http://en.wikipedia.org/wiki/Online_text_based_RPG (last visited Oct. 19, 2006); Wikipedia.org, Interactive Fiction, http://en.wikipedia.org/wiki/Text_adventure_game (last visited Oct. 19, 2006).

209. Ultima III’s graphics, although considered “revolutionary” when it was released in 1983, are almost unidentifiable by today’s standards. See Wikipedia.org, Ultima III, http://en.wikipedia.org/wiki/Ultima_III:_Exodus (last visited Oct. 19, 2006). The primitive graphics underscore a comparatively deep plot involving a demonic villain who can only be

complex, player-guided character development.²¹⁰ They involve a large number of statistics, items, and abilities, each of which is conveyed through the text.²¹¹ The script can also be lengthy depending on the nature of the game.²¹² As such, unlike manga, changing the copyrighted text can fundamentally alter the gaming experience. Thus, the second factor weighs against fair use.

c. Amount and Substantiality of the Used Portion

The third factor, “the amount and substantiality of the portion used in relation to the copyrighted work as a whole,”²¹³ similarly weighs against fair use. The process of fan translating involves only the portion of data that contains text. This portion of data is substantial, however, in terms of both the percentage of data involved and its importance to the game as a whole. Furthermore, because this analysis concerns the entire ROM image, the whole game is necessarily involved. It is impossible to use the translation patch independently; the gamer must also download the original ROM image.²¹⁴ Therefore, the third factor also suggests that fan-translated video games do not constitute fair use.

d. Effect of the Use upon Potential Marketability

Finally, the fourth factor, “the effect of the use upon the potential market for or value of the copyrighted work,”²¹⁵ is currently low but, as discussed above, may increase depending on the market reception of commercial re-releases of older games. For games already released in America, this factor weighs heavily against fair use. Although players choosing to download the illegal version may sacrifice some graphics quality, they would be able to play the game for free and possibly with a better translation. Regarding the many unreleased games, however, this factor weighs the other way. Games

defeated by paying attention to many clues revealed in the text throughout the game. *See id.* (discussing and displaying a screen shot of Ultima III's graphics).

210. *See* Wikipedia.org, Computer Role-Playing Game, http://en.wikipedia.org/wiki/Computer_role-playing_game (last visited Oct. 19, 2006).

211. *Id.*

212. One English translation of only the dialogue in major scenes between the main characters in Final Fantasy V (not including other vital text such as item and town names and dialogue with non-playable characters) is just under 16,000 words. *See* Mark Rosa, Final Fantasy V (1996), http://db.gamefaqs.com/console/snes/file/final_fantasy_v_trans.txt.

213. 17 U.S.C. § 107 (2000).

214. Wikipedia.com, ROM Hacking, *supra* note 189.

215. 17 U.S.C. § 107.

like Bahamut Lagoon, which was originally released in Japan in the 1990s for a console that is no longer in production, currently have little to no chance of an official English language release.²¹⁶ This may change, however, if Nintendo and other developers decide to explore this market for their current consoles.²¹⁷ Thus, the fourth factor is indeterminable. The use is not transformative, however, and all the factors taken together probably bar a fair use defense for fan translations of video games.

3. The Right Results?

Applying the fair use factors to fan-translated manga and video games seems relatively straightforward, and both reach the same result. Yet intuitively, there seems to be a fundamental difference between these two mediums with regard to the rationale for the fair use doctrine. According to the Supreme Court in *Campbell*, the purpose of the fair use doctrine is to “permit[] and require[] courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.”²¹⁸ Prohibiting fan-translated manga does not appear to stifle creativity because a non-Japanese speaking reader is still largely able to enjoy un-translated manga. Such a reader might still purchase Japanese language manga to admire the artwork, and may even be able to have some level of understanding of what was going on in the story. Because the primary focus in manga is the artwork itself, and because even un-translated manga can be easily imported into the United States,²¹⁹ prohibiting fan translations does not deprive the English speaking audience of enjoying most manga.

Video games, however, present a different problem. Without the ability to read Japanese, most English-speaking audiences will not be able to derive much enjoyment from un-translated games. Where the original copyright holder shows no interest whatsoever in marketing a game to an English speaking audience, such as popular

216. See Wikipedia.org, Bahamut Lagoon, http://en.wikipedia.org/wiki/Bahamut_Lagoon (last visited Oct. 19, 2006).

217. See Morris, *supra* note 128.

218. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994) (quoting *Stewart v. Abend*, 495 U.S. 207, 236 (1990)).

219. Sasuga Japanese Bookstore offers over 12,000 untranslated manga through its website. Sasuga Japanese Bookstore, http://www.sasugabooks.com/default.php?cPath=73_74 (last visited Oct. 19, 2006). EBay is another source for untranslated manga. See EBay.com, <http://buy.ebay.com/manga> (last visited Oct. 19, 2006).

Japanese RPG Bahamut Lagoon,²²⁰ it seems unfair that English speaking audiences will never have access to these games because fan translations are illegal. Unlike manga, players cannot easily import and play old cartridges from Japan because American and Japanese versions of the same console are often incompatible, so a Japanese Super Nintendo cartridge will not play on a Super Nintendo console sold in America.²²¹ Furthermore, denying English-speaking audiences the ability to play and enjoy these older games may stifle creativity in the long run, which is exactly the result that the Supreme Court sought to avoid in *Campbell*.²²² As audiences are exposed to a fan-translated version and petition companies for an official release, companies may want to revisit old games and franchises previously thought to be completely unmarketable. In many instances, these re-releases result in better graphics, improved translations, and even additional quests. Unofficial translations, therefore, push companies to infuse these games with new life by adding new content.²²³ Arguably, without the exposure of games like Final Fantasy V brought about by fan translations, Square Enix may never have released an official version because it may not have thought there was enough demand. Thus, fan translations of video games may satisfy an important function by increasing the marketability of games never intended for release in America.

C. Solutions

Until companies in either industry start to litigate these cases, the status quo does not pose a problem. If and when litigation begins, however, courts will be forced to fit this unconventional medium into a test designed to apply to traditional media like books and movies. As argued above, this will lead to an unjust result with respect to fan-translated video games, which will violate the very purpose of the

220. Bahamut Lagoon, unlike other popular fan translations like Final Fantasy V and Dragon Quest V, is not a part of a popular series already marketed in the United States. See Wikipedia.org, Bahamut Lagoon, *supra* note 216 (discussing the Bahamut Lagoon game). Thus the chances of a re-release of this game are arguably very slim, whereas the popularity of titles like Dragon Quest VIII and Final Fantasy X in America may facilitate an English language release of other titles in that series.

221. Nintendo employed several regional lockout mechanisms on the Super Nintendo console, including the use of different shapes for Japanese and American cartridges. Wikipedia.org, Super Nintendo Entertainment System, http://en.wikipedia.org/wiki/Super_Nintendo (last visited Oct. 19, 2006).

222. *Campbell*, 510 U.S. at 577 (citing *Stewart v. Abend*, 495 U.S. 207, 236 (1990)).

223. The re-release of Final Fantasy IV, called Final Fantasy IV Advance, contains several new boss characters and two entirely new dungeons not found in the original Japanese release. Dunham, *supra* note 158.

Copyright Act. The Court could alter, or perhaps clarify, the transformative use test outlined in *Campbell*.

The first solution would be to change the fair use test from a bright-line rule to more of a case-by-case approach. This would expressly conform to the Supreme Court's original intention in *Campbell* that courts analyze fair use determinations on a case-by-case basis, rather than with "bright-line rules."²²⁴ To do this, the Court may have to change the often quoted test of whether the use "adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message."²²⁵ This language was used by the Second Circuit in 1998,²²⁶ and, during the past eight years, the distribution of media on the Internet has expanded rapidly.²²⁷ Although most of this distribution is probably copyright infringement, as argued above, the unique nature of fan-translated video games warrants protection. One approach is to modify the language of the test to encompass the distinct problems with translations.

Alternatively, a court could plausibly hold that fan-translated video games do, in fact, add something new to the original version, because they add new translations with the purpose of giving a new audience access to games that would otherwise be completely unavailable. This approach may be the most practical. When the copyright holder neglects to release the game in a particular language after a certain period of time, she has implicitly given up her exclusive right to release a translated version. Where there is no intention to market the game in a particular country, the concerns of § 106 are stifled. Under this approach, a fan translation of a video game into a language in which it was never intended to be marketed could be a transformative use. Although the implications for other forms of unconventional media are uncertain, there is room for the court to make case-by-case determinations.

IV. CONCLUSION

The Internet continues to break down boundaries in the global community. In an era where film, music, reading materials, and video games can be distributed online with ease, language is a crucial

224. *Campbell*, 510 U.S. at 577.

225. *Id.* at 579.

226. *Leibovitz v. Paramount Pictures Corp.*, 137 F.3d 109, 112 (2d Cir. 1998).

227. Consider the rise of peer-to-peer file distribution programs, such as BitTorrent. See Wikipedia.org, BitTorrent, <http://en.wikipedia.org/wiki/BitTorrent> (last visited Oct. 19, 2006).

remaining barrier to this exchange. As the breadth of media available for distribution online increases, so will its global audience. Today's readers, filmgoers, and gamers all demand access to the best that other countries have to offer. Although English language media are in high demand in foreign countries, Americans' increased appetite for products from other cultures fuels this exchange in the other direction.

Thus far, courts have not fully addressed copyright law's application to translations of fictional works, so little guidance is available for analyzing fan translations of Japanese manga and video games. However, despite the Supreme Court's language to the contrary, courts have drawn bright-line rules under which such fan translations are illegal. Although this may be the correct result with regard to manga, the result for video games would not accord with the basic rationales for the 1976 Copyright Act, as interpreted by the Supreme Court. The current test for transformative use, although useful in evaluating more traditional media like books and film, begins to buckle when applied to these other media. When explicitly confronted with this issue, courts will have to decide whether they will alter the test's language or application, or apply what appears to be a black letter rule to a medium that defies traditional categorization and most likely reach a result contrary to the spirit of the original Act.

The broader implications of this issue are substantial. As various forms of electronic media diversify and continue to be distributed on the Internet, fan translations likely will become even more widespread in an attempt to close the language gap. For some forms of these media, such as manga, fan translations probably do not justify protection by the fair use defense. For video games, however, fan translations may be the only method of bridging this gap if the commercial market has no desire to do so. Furthermore, these fan translations may transform the original enough to justify qualifying as a fair use. If so protected, fan translations can help dissolve international boundaries and promote the creativity that the Copyright Act strives to protect.

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